of coke more efficient and cost-effective. Additionally, this provision will create jobs across the country and preserve thousands of fuel-making jobs in economically hard hit States.

The technical corrections made by this amendment cover minor issues such as who has title to the coal in the few minutes before it enters the coke ovens and whether a minuscule percentage of the feedstock is pure coal or a material called pet coke.

The extension of the tax credit and these minor technical corrections will ensure this credit can actually be used by processors and the steel industry. I am advised that all of the integrated steel companies and the representatives of their workers support this provision, which is a rarity in any industry.

We have been working for nearly a decade to ensure the widespread use of this technology in coke ovens across the country. Across Pennsylvania, coke ovens continue to be used as the engine that drives the American industrial machine. I have long been committed to ensuring we use the cleanest and most efficient method for making steel and in this case, the coke that is an ingredient in the steel-making process.

This is an extender right in line with the thrust of the legislation, an extender which would save many jobs and add many more jobs. So it is right in line with what we are seeking to accomplish.

GRIDLOCK AND RECONCILIATION

Mr. SPECTER. Mr. President, I am now going to speak about the subject of gridlock which confronts this body and the use of the reconciliation process to enact comprehensive health care reform.

We have seen an extraordinary display of gridlock, evidenced at the present time. We have some 30 judicial nominees which are pending, and I ask unanimous consent to have printed in the RECORD the list of nominees following my remarks.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

(See exhibit 1.)

Mr. SPECTER. We have some 64 executive branch nominees who are now pending, and I ask unanimous consent to have printed in the RECORD a list of these nominees following my remarks.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

(See exhibit 2.)

Mr. SPECTER. We have some 13 ambassadorial positions pending, only 1 of which I am advised is controversial, and I ask unanimous consent to have printed in the RECORD a list of these 13 positions following my remarks.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

(See exhibit 3.)

Mr. SPECTER. On many occasions, the majority leader has been compelled to file a cloture petition, which is well known on this Senate floor. I don't believe it even has to be explained to C–SPAN viewers, even though it is technical and arcane, because it has been used so often. But in case anyone new is watching C–SPAN2—or perhaps I should say in case anybody is watching C–SPAN2—just a word of explanation. If a Senator places a hold on a nomination, that is a signal for a filibuster.

Unfortunately, we don't have filibusters. I have been in the Senate now since being elected in 1980 and I have been part of only one real filibuster. Had we utilized that procedure, perhaps there would be fewer holds and fewer moves toward filibuster. People really had to stand up here and argue, as Senator Thurman did historically once, for some 26 hours. But when the majority leader is compelled to file a cloture petition, cloture is invoked, and then some 30 hours must be consumed where the Senate can take care of no additional business, the two lights are on, there is a quorum call, and it is a colossal waste of time.

I am going to recite the facts in five of these cloture petitions to demonstrate that there was never really a controversy. Christopher Hill, Ambassador to the Republic of Iraq, had a cloture vote. Yet his vote in favor was 73 to 17—hardly controversial. Robert M. Groves, of Michigan, to be the Director of the Census, the cloture vote was 76 to 15—not really a contest there at all. Nobody seriously contested his confirmation. David Hamilton to be a judge of the Seventh Circuit, 70 yeas, 29 nays. A cloture petition was filed on Martha N. Johnson to be Administrator of General Services. The vote was 82 to 16. The nomination of Barbara Keenan to be a circuit judge in the Fourth Circuit, 99 to 0.

Mr. President, I ask unanimous consent to have printed in the RECORD the details of these cloture motions and confirmations following my remarks.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

(See exhibit 4.)

Mr. SPECTER. So the stage is now set where we have gridlock on the issue of comprehensive health care reform. In this situation, we have had the bills passed by both the House and the Senate, and we are now looking to use reconciliation, a procedure which has been employed some 22 times in analogous circumstances. Illustrative of the analogous circumstances are the use of cloture to pass Medicare Advantage and the passage of COBRA, the passage of SCHIP—health care for children—and the passage of the welfare reform bill in 1996.

In a learned article in the New England Journal of Medicine, Dr. Henry J. Aaron, an expert on budgetary matters, had this to say:

[reconciliation] can be used only to implement instructions contained in the budget resolution relating to taxes or expenditures. Congress created reconciliation procedures to deal with precisely this sort of situation. . . .

And he is referring here to what we have with the Senate-passed bill and the House-passed bill.

Quoting him further:

The 2009 budget resolution instructed both Houses of Congress to enact health care reform. The House and the Senate have passed similar but not identical bills. Since both Houses have acted but some work remains to be done to align the two bills, using reconciliation to implement the instructions in the budget resolution follows established congressional procedure.

I ask unanimous consent to have printed in the RECORD the full text of this article following my remarks.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

(See exhibit 5.)

Mr. SPECTER. So what we have here, essentially, is gridlock created by the composition of the two Houses of Congress. We have a situation where not one Member on the other side of the aisle voted in favor of the health care bill. In the House of Representatives, the vote was 176 to 1; that is, among the 177 Republicans voting, only 1 out of 177 in the House voted in favor. It is hard to see a more precise definition of ''gridlock'' than what appears here.

It would be my hope that we would be able to resolve the issue without resorting to reconciliation. If there is any doubt about the procedure, our institutional integrity would be enhanced without going in that direction. But if you have to fight fire with fire and since it is a legitimate means, then we can use it.

Five years ago, in 2005, the Senate faced a somewhat similar situation when the roles were reversed, when it was the Democrats filibustering judicial nominees of President Bush. And we find that so often it depends on whose ox is being gored as to who takes the position. Some of the most vociferous objectors to the use of reconciliation on comprehensive health care reform have filled the CONGRESSIONAL RECORD with statements in favor of using reconciliation in analogous circumstances when it helped their cause. But in the year 2000, it was the Democrats stymying Republican judicial nominees. During the Clinton administration, it was exactly reversed—it was Republicans stymying Clinton's judicial nominees. Fortunately, in 2005 we were able to work out the controversy. We were able to confirm some of the judges, some of the judges were withdrawn, and we did not move for what was called the nuclear option, which would have confirmed judges by 51 votes.

The procedural integrity of the Senate is very important. Without going into great detail, it was the Senate that saved the independence of the Federal judiciary when the Senate acquitted Supreme Court Justice Chase

in 1805, and it was the Senate that preserved the power of the Presidency on the impeachment proceeding of Andrew Johnson in 1868. Congress sought to have limited the President's power to discharge a Cabinet officer in the absence of approval by the Senate. Well, the Senate has to confirm, but the Senate doesn't have standing to stop the President from terminating the services of a Cabinet officer. And there, the Senate saved it through the courageous vote of a single Senator—a Kansan, I like to mention, being one originally myself.

So it would be fine if we could find some way to solve the problem, but absent that, this Senate reconciliation procedure is entirely appropriate. We have gotten much more deeply involved in the research and analysis as this issue has come to the floor on comprehensive health coverage.

The gridlock that faces the Senate and the country today has profound implications beyond the legislation itself. It is hard to find something more important than insuring the millions of Americans now not covered or to find something more important than stopping the escalating cost of health insurance, driving many people to be uninsured and raising the prices for small businesses where it cannot be afforded. But the fact is, this gridlock is threatening the capacity in this country to govern—really threatening the capacity to govern.

Secretary of State Hillary Clinton was before the Subcommittee on Foreign Operations of the Committee on Appropriations, and I asked her about this issue. I asked her about the President not being able to:

. . . project the kind of stature and power that he did a year ago because he is being hamstrung by Congress. And it has an impact on foreign policy which we really ought to do everything we can not to have partisanship influence.

Secretary of State Clinton replied as follows:

Senator, I think there is certainly a perception that I encounter in representing our country around the world that supports your characterization. People don't understand the way our system operates, they just don't get it. Their view does color whether the United States is in a position—not just this President but our country—is in a position going forward to demonstrate the kind of unity and strength and effectiveness that I think we have to in this very complex and dangerous world.

She continued a little later:

We have to be attuned to how the rest of the world sees the functioning of our Government. Because it's an asset. It may be an intangible asset, but it's an asset of great importance and as we sell democracy, and we're the lead democracy in the world, I want people to know that we have checks and balances, but we also have the capacity to move too.

So what we find is a diminution of the authority and stature of the President, a diminution of the authority and stature of the Presidency, and ultimately a diminution and reduction in the stature of our country unable to deal with these problems. So it would be my hope we could yet resolve this issue with a little bipartisanship. It would not take a whole lot, but at the moment there is none, with 40 Senators voting no, all those on the other side of the aisle, and 176 out of 177 Republicans in the House voting no. That simply is no way to govern.

EXHIBIT 1—JUDICIAL NOMINEES

Name	Court	Nomination date	Days since nom
Black, Timothy S.	Southern District of Ohio	12/24/2009	74
Butler, Louis B. Jr.	Western District of Wisconsin	9/30/2009	159
Chatigny, Robert Neil	Second Circuit	2/24/2010	12
Childs, J. Michelle	District of South Carolina	12/22/2009	76
Chin, Denny	Second Circuit	10/6/2009	153
Coleman, Sharon Johnson	Northern District of Illinois	2/24/2010	12
Conley, William M.	Western District of Wisconsin	10/29/2009	130
DeGuilio, Jon E.	Northern District of Indiana	1/20/2010	47
Diaz, Albert	Fourth Circuit	11/4/2009	124
Feinerman, Gary Scott	Northern District of Illinois	2/24/2010	12
Fleissig, Audrey Goldstein	Eastern District of Missouri	1/20/2010	47
Foote, Elizabeth Erny	Western District of Louisiana	2/4/2010	32
Freudenthal, Nancy D.	District of Wyoming	12/3/2009	95
Gergel, Richard Mark	District of South Carolina	12/22/2009	76
Goldsmith, Mark A.	Eastern District, Michigan	2/4/2010	32
Goodwin, Liu	Ninth Circuit	2/24/2010	12
Jackson, Brian Anthony	Middle District of Louisiana	10/29/2009	130
Koh, Lucy Haeran	Northern District of California	1/20/2010	47
Magnus-Stinson, Jane E.	Southern District of Indiana	1/20/2010	47
Marshall, Denzil Price Jr.	Eastern District, Arkansas	12/3/2009	95
Martinez, William Joseph	District of Colorado	2/24/2010	12
Navarro, Gloria M.	District of Nevada	12/24/2009	74
Pearson, Benita Y.	Northern District of Ohio	12/3/2009	95
Stranch, Jane Branstetter	Sixth Circuit	8/6/2009	214
Thompson, Rogeriee	First Circuit	10/6/2009	153
Treadwell, Marc T.	Middle District of Georgia	2/4/2010	32
Tucker, Josephine Staton	Central District of California	2/4/2010	32
Vanaskie, Thomas I	Third Circuit	8/6/2009	215
Walton Pratt, Tanya	Southern District of Indiana	1/20/2010	47
Wynn, James A. Jr.	Fourth Circuit	11/4/2009	124

EXHIBIT 2

Earl J. Gohl was nominated to be the Federal Co-Chairman of the Appalachian Regional Commission on Nov. 17, 2009 and has been waiting 111 days since his nomination.

Michael C. Camunez was nominated to be the Assistant Secretary for Market Access and Compliance of the Commerce Department on March 2, 2010 and has been waiting 6 days since his nomination.

Eric L. Hirschhorn was nominated to be the Under Secretary for Export Administration of the Commerce Department on Sept. 14, 2009 and has been waiting 175 days since his nomination.

Timothy McGee was nominated to be the Assistant Secretary for Observation and Prediction on Dec. 21, 2009 and has been waiting 77 days since his nomination.

Larry Robinson was nominated to be the Assistant Secretary of Commerce for Conservation and Management, NOAA of the Commerce Department on Feb. 4, 2010 and has been waiting 32 days since his nomination.

Francisco ''Frank'' J. Sanchez was nominated to be the Under Secretary for International Trade of the Commerce Department on April 20, 2009 and has been waiting 322 days since his nomination.

Sharon E. Burke was nominated to be the Director of Operational Energy Plans and Programs of the Defense Department on Dec. 11, 2009 and has been waiting 87 days since her appointment.

Solomon B, Watson IV was nominated to be the General Counsel of the Army of the Defense Department on Nov. 20, 2009 and has been waiting 108 days since his nomination.

Joseph F. Bader was nominated to be a member of the Defense Nuclear Facilities Safety Board on Oct. 16, 2009 and has been waiting 143 days since his nomination.

Jessie H. Roberon was nominated to be a member of the Defense Nuclear Facilities Safety Board on Oct. 16, 2009 and has been waiting 143 days since his nomination.

Peter S. Winokur was nominated to be the Chairman of the Defense Nuclear Facilities Safety Board on Oct. 16, 2009 and has been waiting 143 days since his nomination.

Jim R. Esquea was nominated to be the Assistant Secretary for Legislation of the Department of Health and Human Services on Aug, 6, 2009 and has been waiting 214 days since his appointment.

Sherry Glied was nominated to be the Assistant Secretary for Planning and Evaluation of the Department of Health and Human Services on July 9, 2009 and has been waiting 119 days since her appointment.

Nicole Lurie was nominated to be the Assistant Secretary for Preparedness and Response of the Department of Health and Human Services on June 1, 2009 and has been waiting for 280 days since her nomination.

Richard Sorian was nominated to be the Assistant Secretary for Public Affairs of the Department of Health and Human Services on Oct. 5, 2009 and has been waiting 154 days since his nomination.

Alan D. Bersin was nominated to be the Commissioner of U.S. Customs and Border Protection of the Department of Homeland Security on Sept. 29, 2009 and has been waiting 160 days since his nomination.

Rafael Borras was nominated to be the Under Secretary for Management of the Department of Homeland Security on July 6, 2009 and has been waiting 245 days since his nomination.

Steven Jacques was nominated to be the Assistant Secretary for Public Affairs of the Department of Housing and Urban Development on Sept. 29, 2009 and has been waiting 160 days since his nomination.

Eduardo M. Ochoa was nominated to be the Assistant Secretary for Postsecondary Education of the Education Department on Feb. 24, 2009 and has been waiting 377 days since his nomination.

Kathleen S. Tighe was nominated to be the Inspector General of the Education Department on Nov. 20, 2009 and has been waiting 108 days since her nomination.

Donald L. Cook was nominated to be the Deputy Administrator for Defense Programs, National, Nuclear Security Administration of the Energy Department on Dec. 3, 2009 and has been waiting 95 days since his nomination.

Patricia A. Hoffman was nominated to be the Assistant Secretary for Electricity Delivery and Energy Reliability of the Energy Department on Dec. 9, 2009 and has been waiting 89 days since her nomination.

Jeffrey A. Lane was nominated to be the Assistant Secretary for Congressional and Intergovernmental Affairs of the Energy Department on Feb. 1, 2010 and has been waiting 35 days since his nomination.

Arthur Elkins, Jr. was nominated to be the Inspector General of the Environmental Protection Agency on Nov. 18, 2009 and has been waiting 110 days since his nomination.

Jacqueline A. Berrien was nominated to be the Chairman of the Equal Employment Opportunity Commission on July 16, 2009 and has been waiting 235 days since her nomination.

Chai R. Feldblum was nominated to be the Commissioner of the Equal Employment Opportunity Commission on Sept. 15, 2009 and has been waiting 174 days since his nomination.

Victoria Lipnic was nominated to be the Commissioner of the Equal Employment Opportunity Commission on Nov. 3, 2009 and has been waiting 125 days since her nomination.

David P. Lopez was nominated to be the General Counsel of the Equal Employment Opportunity Commission on Oct. 26, 2009 and has been waiting 133 days since his nomination.

Jill Long Thompson was nominated to be a member of the Farm Credit Administration on Oct. 16, 2009 and has been waiting 143 days since her nomination.

Patrick K. Nakamura was nominated to be a member of the Federal Mine Safety and Health Review Commission on Nov. 30, 2009 and has been waiting 98 days since his nomination.

Beatrice Hanson was nominated to be the Director of the Office for Victims of Crime for the Justice Department on Dec. 23, 2009 and has been waiting 75 days since her nomination.

Dawn E. Johnson was nominated to be the Assistant Attorney General for Office of Legal Counsel for the Justice Department on Feb. 11, 2009 and has been waiting 390 days since her nomination.

John E. Laub was nominated to be the Director of the National Institute of Justice for the Justice Department on Oct. 5, 2009 and has been waiting 154 days since his nomination.

Michele Marie Leonhart was nominated to be the Drug Enforcement Administrator for the Justice Department on Feb. 2, 2010 and has been waiting 34 days since her nomination.

James P. Lynch was nominated to be the Director of the Bureau of Justice Statistics for the Justice Department on Oct. 29, 2009 and has been waiting 130 days since his nomination.

Christopher H. Schroeder was nominated to be the Assistant Attorney General for Legal Policy for the Justice Department on June 4, 2009 and has been waiting 277 days since his nomination.

Mary L. Smith was nominated to be the Assistant Attorney General for Tax Division for the Justice Department and has been waiting 322 days since her nomination.

J. Patricia Wilson Smoot was nominated to be the Parole Commissioner for the Justice Department on Feb. 1, 2010 and has been waiting 35 days since her nomination.

James L. Taylor was nominated to be the Chief Financial Officer for the Labor Department on March 3, 2010 and has been waiting 5 days since his nomination.

Craig Becker was nominated to be a board member of the National Labor Relations Board and has been waiting 242 days since his nomination.

Brian Hayes was nominated to be a board member of the National Labor Relations Board on July 9, 2009 and has been waiting 242 days since his nomination.

Mark Pearce was nominated to be a board member of the National Labor Relations Board on July 9, 2009 and has been waiting 242 days since his nomination.

Mark R. Rosekind was nominated to be a member of the National Transportation Safety Board on Oct. 1, 2009 and has been waiting 158 days since his nomination.

George Apostolakis was nominated to be the Commissioner of the Nuclear Regulatory Commission on Oct. 13, 2009 and has been waiting 146 days since his nomination.

William D. Magwood, IV was nominated to be the Commissioner of the Nuclear Regulatory Commission on Oct. 13, 2009 and has been waiting 146 days since his nomination.

William C. Ostendorrf was nominated to be the Commissioner of the Nuclear Regulatory Commission on Dec. 11, 2009 and has been waiting 87 days since his nomination.

Benjamin Tucker was nominated to be the Deputy Director for State, Local and Tribal Affairs of the Office of National Drug Control Policy on Aug. 6, 2009 and has been waiting 214 days since his nomination.

Philip E. Coyle was nominated to be the Associate Director for National Security and International Affairs of the Office of Science and Technology Policy on Oct. 27, 2009 and has been waiting 132 days since his nomination.

Larry Persily nominated to be Federal Coordinator for the Office of the Federal Coordinator Alaska Natural Gas Transportation Projects on Dec. 9, 2009, waiting 89 days.

Michael W. Punke nominated to be Deputy United States Trade Representative for Geneva with the Office of the United States Trade Representative on Sept. 14, 2009, waiting 175 days.

Islam A. Siddiqui nominated to be Chief Agricultural Negotiator for the Office of the United States Trade Representative on Sept. 24, 2009, waiting 165 days.

Elizabeth Littlefield, nominated to be President of the Overseas Private Investment Corporation on Nov. 20, 2009, waiting 108 days.

Carrie Hessler Radelet, nominated to be Deputy Director of the Peace Corps on Nov. 9, 2009, waiting 119 days.

Joshua Gotbaum, nominated to be Director of the Pension Benefit Guaranty Corporation on Nov. 9, 2009, waiting 119 days.

Marie Collins Johns, nominated to be Deputy Administrator of the Small Business Administration on Dec. 17, 2009, waiting 81 days.

Winslow Sargeant, nominated to be Chief Counsel for Advocacy of the Small Business Administration on June 8, 2009, waiting 273 days.

Robert Blake, nominated to be Assistant Secretary for South Central Asian Affairs at the State Department on April 27, 2009, waiting 315 days.

Ann Stock, nominated to be Assistant Secretary of Educational and Cultural Affairs of the State Department on Dec. 4, 2009, waiting 95 days.

Leocadia I. Zak, nominated to be Director of the Trade and Development Agency on Nov. 16, 2009, waiting 112 days.

Michael P. Huerta, nominated to be Deputy Administrator of the Transportation Department on Dec. 8, 2009, waiting 90 days.

David T. Matsuda, nominated to be Administrator of Maritime Administration of the Transportation Department on Dec. 17, 2009, waiting 81 days.

Lael Brainard, nominated to be Under Secretary for International Affairs for the Treasury Department on March 23, 2009, waiting 350 days.

Jeffery Goldsteing nominated to be Under Secretary for Domestic Finance.

Michael F. Mundaca, nominated to be Assistant Secretary for Tax Policy at the Treasury Department on Oct. 6, 2009, waiting 153 days.

EXHIBIT 3

Three other nominations are still awaiting final vote:

Laura E. Kennedy, a Career Member of the Senior Foreign Service for the rank of Ambassador during her tenure of service as U.S. Representative to the Conference on Disarmament. (Reported out of SFRC on Dec 08, 2009).

Eileen Chamberlain Donahoe, for the rank of Ambassador during her tenure of service as the United States Representative to the UN Human Rights Council. (Reported out of SFRC on Dec 08, 2009).

Islam A. Siddiqui, to be Chief Agricultural Negotiator, Office of the United States Trade Representative (USTR), with the rank of Ambassador (Reported by Mr. Baucus, Committee on Finance on Dec 23, 2009).

The Senate Foreign Relations Committee reported the following 10 nominees out on February 26, 2010. They are awaiting final vote by the Senate to take up their posts.

Donald E. Booth, to be Ambassador to Ethiopia.

Scott H. DeLisi, to be Ambassador to Nepal.

Beatrice Wilkinson Welters, to be Ambassador to Trinidad and Tobago.

David Adelman, to be Ambassador to Singapore.

Harry K. Thomas, Jr., to be Ambassador to the Philippines.

Allan J. Katz, to be Ambassador to Portugal.

Ian C. Kelly, to be U.S. Representative to the Organization for Security and Cooperation in Europe (OSCE), with the rank of Ambassador.

Brooke D. Anderson, to be Alternate Representative of the United States of America for Special Political Affairs in the United Nations, with the rank of Ambassador.

Rosemary Anne DiCarlo, to be the Deputy Representative of the United States of America to the United Nations, with the rank and status of Ambassador Extraordinary and Plenipotentiary, and the Deputy Representative of the United States of America in the Security Council of the United Nations.

Judith Ann Stewart Stock, to be an Assistant Secretary of State (Educational and Cultural Affairs).

EXHIBIT 4

Question: On the Cloture Motion (Motion to Invoke Cloture on the Nomination of

Christopher R. Hill, of R.I. to be Ambassador to the Republic of Iraq)

Vote Number: 158; Vote Date: April 20, 2009, 06:51 PM; Required for Majority: 3/5; Vote Result: Cloture Motion Agreed to; Nomination Number: PN171; Nomination Description: Christopher R. Hill, of Rhode Island, to be Ambassador to the Republic of Iraq; Vote Counts: YEAs: 73; NAYs: 17; Not Voting: 9. AS: Y.

Question: On the Cloture Motion (Motion to Invoke Cloture on the Nomination of Robert M. Groves, to be Director of the Census)

Vote Number: 230; Vote Date: July 13, 2009, 05:41 PM; Required for Majority: 3/5; Vote Result: Cloture Motion Agreed to; Nomination Number: PN387; Nomination Description: Robert M. Groves, of Michigan, to be Director of the Census; Vote Counts: YEAs: 76; NAYs: 15; Not Voting: 9. AS: Y.

Question: On the Motion (Motion to Invoke Cloture on the Nomination of David F. Hamilton, of Indiana, to be U.S. Circuit Judge for the Seventh Circuit.)

Vote Number: 349; Vote Date: November 17, 2009, 04:37 PM; Required for Majority: 3/5; Vote Result: Motion Agreed to; Nomination Number: PN187; Nomination Description: David F. Hamilton, of Indiana, to be United States Circuit Judge for the Seventh Circuit; Vote Counts: YEAs: 70; NAYs: 29; Not Voting: 1. AS: Y.

Question: On the Cloture Motion (Motion to Invoke Cloture on the Nomination of Martha A. Johnson to be Administrator of General Services Administration)

Vote Number: 19; Vote Date: February 4, 2010, 02:47 PM; Required for Majority: 3/5; Vote Result: Cloture Motion Agreed to; Nomination Number: PN393; Nomination Description: Martha N. Johnson, of Maryland, to be Administrator of General Services; Vote Counts: YEAs: 82; NAYs: 16; Not Voting: 2. AS: Y.

Question: On the Cloture Motion (Motion to Invoke Cloture on the Nomination of Barbara Milano Keenan, of VA, to be U.S. Circuit Judge)

Vote Number: 29; Vote Date: March 2, 2010, 12:15 PM; Required for Majority: 3/5; Vote Result: Cloture Motion Agreed to; Nomination Number: PN937; Nomination Description: Barbara Milano Keenan, of Virginia, to be United States Circuit Judge for the Fourth Circuit; Vote Counts: YEAs: 99; NAYs: 0 Not Voting: 1. AS: Y.

EXHIBIT 5

[From the New England Journal of Medicine]

FORGING AHEAD—EMBRACING THE ''RECONCILIATION'' OPTION FOR REFORM

The course of health care reform in 2009 resembled the silent movie series ''The Perils of Pauline,'' in which each episode began with a threat to the heroine's life but ended with her salvation.

Despite repeated near-death experiences, reform legislation passed both houses of Congress. After so many obstacles had been surmounted, the remaining task of reconciling the House and Senate bills seemed doable.

Then, a political earthquake hit. Republican Scott Brown won the Massachusetts senatorial seat that had been held for 47 years by the late Senator Edward M. Kennedy, thwarting the capacity of the remaining 57 Democrats and two independents to bring anything to a vote in the Senate over the united opposition of the 41 Republicans. The election also caused something approaching a panic attack among White House and congressional Democrats, who called variously for dropping health care reform, trying to pass one scaled-back bill or several smaller bills, moving slowly on doing anything, seeking compromise with Republicans on some (unspecified) new approach, or having the House pass the Senate bill subject to modifications, which both houses would pass separately, to make the Senate bill acceptable to the House. Passing the fixes in the last of these options hinged on using ''reconciliation,'' a procedure that requires only a majority vote but that can be used only to implement instructions contained in the budget resolution relating to taxes or expenditures. Passage of the modifications would follow House approval of the Senate-passed bill.

The idea of using reconciliation has raised concern among some supporters of health care reform. They fear that reform opponents would consider the use of reconciliation high-handed. But in fact Congress created reconciliation procedures to deal with precisely this sort of situation—its failure to implement provisions of the previous budget resolution. The 2009 budget resolution instructed both houses of Congress to enact healt care reform. The House and the Senate have passed similar but not identical bills. (Since both houses have acted but some work remains to be done to align the two bills, using reconciliation to implement the instructions in the budget resolution follows established congressional procedure.)

Furthermore, coming from Republicans, objections to the use of reconciliation on procedural grounds seem more than a little insincere. A Republican president and a Republican Congress used reconciliation procedures in 2001 to enact tax cuts that were supported by fewer than 60 senators. The then-majority Republicans could use reconciliation only because they misrepresented the tax cuts as temporary although everyone understood they were intended to be permanent—but permanent cuts would have required the support of 60 senators, which they did not have.

The more substantive objection to the use of reconciliation for passing health care reform derives from the fact that, according to polls, more Americans oppose than support what they think is in the reform bills. It is hardly surprising that people are nervous about health care reform. Most Americans are insured and are reasonably satisfied with their coverage. In principle, large-scale reform could upset current arrangements.

If public perceptions of the intended and expected effects of the current bills were accurate, democratically elected representatives might be bound to heed the concerns. Because the perceptions are inaccurate, reform supporters have a duty to do a better job of explaining what health care reform will do. When participants in focus groups are informed about the bills' actual provisions, their views become much more positive. The prevailing views have clearly been shaped by opponents' misrepresentations of the reform plans, which supporters have done little to rebut. Opponents have described as a ''government takeover'' plans that would cause tens of millions of people to buy insurance from private companies. They have told people that a plan deemed by the Congressional Budget Office to be a deficit reducer is actually a budget buster. They have fostered the canard that end-of-life counseling would mean the creation of ''death panels'' (a claim that PolitiFact.com labeled ''the lie of the year''). They have persuaded Americans that their insurance arrangements would be jeopardized by plans that would in fact leave most coverage untouched, add coverage for millions of Americans, and protect millions of others from cancellation of their coverage and from unaffordable rate increases in the event of serious illness.

Meanwhile, supporters have spent most of their time on seemingly endless debates with one another about specific legislative provisions—whether to include a public option in the reform legislation, whether to have a single national insurance exchange or separate state exchanges, how to enforce a mandate that everyone carry insurance and how much to spend on subsidies to make that mandate acceptable, how to enforce a mandate on all but small employers to sponsor and pay for basic coverage for their workers, and scores of other complex and bewildering technical provisions.

Health care reformers in the administration and Congress have a powerful case to make and, on an issue of such enormous importance, a duty to make it. In addition to reminding Americans that reform will protect, not jeopardize, coverage by preventing insurance companies from canceling coverage or jacking up premiums for the sick, reform advocates should remind them that the proposed legislation will bring coverage to tens of millions of currently uninsured Americans and protect it for scores of millions of others. Reform advocates should explain the legislation's legitimate promise of cost control and quality improvement.

President Barack Obama has announced a bipartisan meeting on moving the reform process forward. It is an opportunity for all sides to present ideas for improving the bills that already have been passed by both houses of Congress. If modifications are identified that will command the support of simple majorities in both houses, they should be adopted through reconciliation. Then the House should pass the Senate bill.

Other strategies, in my view, have no prospect of success. Abandoning the reform effort is the worst strategy of all—not only for reform advocates, but for the nation. Reform advocates are already on record as supporting reform. Voters who oppose reform will not forget that fact come November, and those who support it will find little reason to make campaign contributions to or turn out to vote for lawmakers who were afraid to use large congressional majorities to implement legislation that would begin long-overdue efforts to extend coverage, slow the growth of spending, and improve the quality of care.

The start-from-scratch and piecemeal-legislation strategies are invitations to time-consuming failure. The Senate would need 60-vote majorities for every component of such reforms. To be sure, lawmakers could craft a different bill that would extend coverage to fewer people than the current bills do. But they could not institute serious insurance market reforms without assuring a balanced enrollee pool—or assure such a pool without mandating coverage. Nor is it politically possible or ethically fair to mandate coverage without offering subsidies for low- and moderate-income people. And it is not possible to prevent those subsidies from increasing deficits without tax increases or spending cuts, which reform opponents won't support and which would require 60 Senate votes. The call to start anew is naive at best. At worst, it is a disingenuous siren song, luring health care reformers into a political swamp.

Reformers' best choice is to embrace the democratic process and attempt to persuade voters that the current legislation is in the national interest. They have 10 months to succeed before the midterm elections.

If would-be reformers retreat in the face of current public opinion polls, they will be sent packing in November. Arguably, they will deserve to lose. If they stand up for their genuinely constructive legislation, they can prevail—and will deserve to win.

Mr. SPECTER. I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from Arizona.

Mr. KYL. Mr. President, I opened the newspaper, the New York Times, on

Sunday morning and was surprised—shocked—at a full-page advertisement I saw. It had a big headline that said: ''What will it be, Mr. President? Change or more of the same?'' Then it had four photographs or artist's renderings. The first one was of President Barack Obama. It gradually morphed from Barack Obama into George W. Bush, so the last in the frame of four was clearly a likeness of President George W. Bush.

This was an advertisement paid for by the American Civil Liberties Union, the ACLU. I do not know what surprised me more, whether it was the audacity and the blatant partisanship of the ad or its ignorance and misrepresentation of the law. Either way, it deserves some comment today.

The essence of the ad was to obviously try to put some pressure on President Obama not to change his initial decision to transfer the trial of Khalid Shaikh Mohammed to the Manhattan Federal district court, the so-called article III court, back to a military commission where it had originally been. The ad makes the point that ''Barack Obama vowed to change Bush-Cheney policies''—I am quoting now—''and restore America's values of justice and due process.''

Of course, those values didn't exist under the Bush administration, according to the ACLU. They then say they are ''shocked and concerned'' the President is considering changing the 9/11 defendants' trials from criminal court back to military commissions. They say that: ''Our criminal justice system will resolve the cases more quickly and more credibly than the military commissions.'' That is a matter of dispute, which I will get back to in a moment, but then there is this sentence: ''Obama can vigorously prosecute terrorists and keep us safe without violating our Constitution.'' The implication, of course, being if you go to a military commission, you are violating the Constitution.

If that is what they mean to convey, and it is clear they do, the writers of this ad are obviously intentionally misrepresenting the law. The U.S. Supreme Court has upheld military commissions. You can go back to the 1950s case of Johnson v. Eisentrager, involving German war prisoners.

The current U.S. Supreme Court in the Hamdan decision made it clear the President, with authority from Congress, could establish military commissions to try the very people we are talking about, these Islamic terrorists. Indeed, the President came to Congress and, with changes from the administration recommended by the Justice Department, Congress passed the Military Commissions Act of 2006. That act is available to try many of these same terrorists. Indeed, the Attorney General has made it clear there are four categories of these terrorists held at Gitmo. They want to try to release some of them back to their country of origin; they believe some of them should be tried in article III courts—that is like the Federal district court in Manhattan; others of them should be tried before the military commissions that the ACLU seems to think would violate due process; and, finally, that they intend to hold some of them for the duration of the conflict, which is also authorized.

Here you have one of the, at least I thought, preeminent legal authorities in the country—granted they always seem to take the side of the little guy without representation or the person who is not looked upon with great favor who needs legal representation, frequently to represent cases that represent different points of view—certainly, performing a service to our legal community over the years, most people I think would acknowledge. But now they have turned into a blatant partisan political entity that I think can have no more credibility in court for both reasons: First, because of the nature of this, morphing President Obama's face into President George W. Bush's face and talking about changing the Bush-Cheney policies, which obviously they believe do not represent America's values of justice and due process, contending that you have to go to article III courts to try these people or else you are violating our Constitution.

The final conclusion: ''The President must decide whether he will keep his solemn promise to restore our Constitution and due process or ignore his vow and continue the Bush-Cheney policies,'' which in their view, I gather, means not having constitutional rights and due process.

Again, this administration helped the Congress write the military commissions law. That law is in effect today. The administration intends to try many of these same terrorists before those military commissions. The constitutionality of military commissions has been upheld in the past. The constitutionality of the President and the Congress doing so in the future was acknowledged by the Supreme Court in the Hamdan case. No court has ruled that the military commissions that were thus created in the 2006 act would, as the ACLU suggests, violate our Constitution or due process. So what exactly is the ACLU talking about?

Moreover, I said I would get back to it, the ad suggests that the ''criminal justice system,'' meaning the article III courts, ''will resolve these cases more quickly and more credibly than the military commissions.''

Absolutely false, demonstrably false. Khalid Shaikh Mohammed, the kind of poster child here, the mastermind of 9/11, was before the military commission at Guantanamo, and he said he wanted to plead guilty in the military commission. That case could have been over with had his guilty plea been accepted.

I cannot think of a quicker and more successful outcome than accepting the guilty plea of Khalid Shaikh Mohammed.

When the Attorney General came before the Judiciary Committee and hemmed and hawed about what his reason was for moving this trial to the Manhattan Federal district court, he basically settled on the proposition that it would represent a more sure way to gain a conviction. I asked him: ''Mr. Attorney General, this defendant has agreed to plead guilty before the military commission. How much surer of a conviction do you get than that?''

Well, the Attorney General said he wasn't sure he still wanted to plead. But he also assured us, pursuant to a question one of my colleagues asked—what would happen if, for some reason, the court decided to let him go—the Attorney General said: ''Failure of conviction is not an option.''

In other words, he will be convicted, and both he and the President have talked about execution. If the ACLU and the administration are so intent on showing off the great American judicial system which presumes innocence over guilt—and it is literally unethical for prosecutors to go out before the public and guarantee the conviction and execution of a defendant—then it seems to me to be rather odd that this Attorney General would say: Oh, failure is not an option. He will be convicted and, by inference, he will be executed by our wonderful article III courts which, of course, presume innocence.

How the ACLU can say he would be more quickly and more credibly treated than through military commissions is beyond me, after these particular statements.

I go back to my original perplexity: As I say, I don't know whether to be more surprised by the audacity of this organization with a blatantly partisan political ad, obviously highly critical of the Bush-Cheney administration, implying it did not believe in America's values of justice and due process or by the ignorance and misrepresentation of the law by the ACLU. They have smart lawyers, so I assume it is not ignorance, but they are clearly misleading anyone who reads this ad in suggesting both that military commissions would not be pursuant to the Constitution or due process but would rather be a continuation of Bush-Cheney policies. Bear in mind, the new Military Commissions Act of 2006 is not a Bush-Cheney military commission, this is a current U.S. Congress Obama administration military commission law, signed into law by President Bush.

When the ACLU says prosecuting them in the article III courts would keep us safe without violating our Constitution, one has to assume they believe the Military Commissions Act would be violative of the U.S. Constitution, and that is incorrect.

It is unclear to me what is gained by politicizing this issue. My colleague, LINDSEY GRAHAM, has talked about the idea of some kind of bipartisan arrangement, whereby the President will acknowledge the will of the American

people, which is very strongly against trying these terrorists in the article III courts and in favor of trying them in military commissions. It seems to me there is sufficient understanding. The administration certainly agrees with the Military Commissions Act. It has said it would use that act to try some of these terrorists. It doesn't believe that act represents an unconstitutional approach to deal with these people. According to public opinion surveys, the American public opinion is very strongly of the view that these cases should be tried before military commissions.

That being the case, it seems to me there is an opportunity for us not to try to make this a partisan issue but to try to follow what the American people believe should be the case; that these cases can and should be tried before military commissions when appropriate; that there is also a place for them to be tried before article III courts; that some of them potentially can be returned to their country of origin, although that represents a significant danger, considering the fact that about 20 percent of them return to the battlefield to fight our forces or that there is a category that cannot be tried in either article III courts or before military commissions.

It seems to me we can have a legitimate discussion of this; that the law that the previous President signed into law that represents the point of view of both Democrats and Republicans, that allows for military commissions, can be used; that the President would be well within his rights to use military commissions; that it would comport with the law as acknowledged by the U.S. Attorney General and would reflect the views of the American people that it is important these terrorists be treated, first and foremost, as enemies of the United States and only if appropriate in article III courts as common criminals.

Finally, the last point I would make is, to some extent, the location of the trial is a lot less important than the primary objective when an enemy terrorist is captured; that is, to get intelligence.

I think this is what upset the American people: when, the first thing that happened, after 50 minutes of questioning of the so-called Christmas Day bomber, that he was read his Miranda rights and he stopped providing intelligence to those who were interrogating him.

Subsequently, that intelligence interrogation has resumed. But we will never know what kind of real-time intelligence was lost as a result of the reading of Miranda rights. When we try people in article III courts, we are going to have to quickly provide these Miranda rights. That ordinarily will mean we give up important—potentially give up important intelligence that we could gain by interrogating the individual.

Now, it is not the case that necessarily we would be foreclosed from trying the individual in an article III court because we can rely on something other than the confession of the individual to gain his conviction. In the case of the would-be bomber on Christmas Day, there was plenty of physical evidence: he was burned badly, there were eyewitnesses, and we did not need a confession of the individual.

So the Mirandizing in that case was largely irrelevant; the point being that what we ought to be doing is getting the intelligence first and then deciding which is the appropriate court in which to try the individual. In many cases, that will be military commissions. An organization which has studied the history of the ACLU should appreciate the fact that military commissions are constitutional. They do not violate due process rights. A defendant such as Khalid Sheikh Mohammed could be tried before a military commission in a perfectly appropriate and constitutional way, and it takes nothing away from our article III court system or from President Obama's leadership as President of the United States to hold those trials of this kind of individual in the military commissions.

To describe this advertisement, I ask unanimous consent that a Fox News article dated March 7 be printed in the RECORD at the conclusion of my remarks.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

ACLU LIKENS OBAMA TO BUSH IN AD SLAMMING POSSIBLE REVERSAL ON KSM TRIAL

The possibility that President Obama could send the self-professed mastermind of the Sept. 11 attacks to a military tribunal has earned him the highest insult from the left—that he's another George W. Bush.

A full-page ad in Sunday's New York Times left no doubt as to how the American Civil Liberties Union feels about the possibility of the president reversing the decision to send Khalid Sheikh Mohammed and his alleged co-conspirators to civilian court.

''What will it be Mr. President?'' the ad asks in boldfaced type. ''Change or more of the Same?''

In the middle of those words are four photos that show Obama's face morphing into Bush's.

''Many of us are shocked and concerned that right now, President Obama is considering reversing his attorney general's decision to try the 9/11 defendants in criminal court,'' the advertisement continues. ''Our criminal justice system has successfully handled over 300 terrorism cases compared to only 3 in the military commissions.''

The ad follows a series of reports that reflect a softening of the administration's position that the accused Sept. 11 architects must be tried in federal court instead of military tribunals.

The public softening is part of a test, a source told Fox News, to gauge how infuriated the left would be by reversing course. The White House knows Republicans like the idea of the tribunals being used—and needs their support on other key national security matters—but a shift on this issue could poison the waters between the president and the liberal base, as demonstrated by the ACLU ad.

''As president, Barack Obama must decide whether he will keep his solemn promise to restore our Constitution and due process, or ignore his vow and continue the Bush-Cheney policies,'' the ACLU ad said.

Republican Sen. Lindsey Graham, R–S.C., speaking on CBS' ''Face the Nation,'' said the ACLU ad was out of line.

''The president is getting unholy grief from the left,'' said Graham, who supports moving the defendants to tribunals. ''The ACLU theory of how to manage this war I think is way off base.''

Some are urging groups like the ACLU to look at the bigger picture.

Attorney General Eric Holder announced in November that the defendants would be heading to Manhattan civilian court, but that move has generated a huge backlash from New Yorkers, including the mayor and police chief, as well as Republicans in Congress. The backlash has forced the administration to reconsider not just the location of the trial but the forum.

''Foreign terrorists ought not to be tried in U.S. courts. Period,'' Senate Minority Leader Mitch McConnell told Fox News. ''They ought to be taken to Guantanamo, detained there, interrogated there and adjudicated there in military tribunals.''

A source told Fox News that if the administration decides to send the case back to the commissions, it could be part of a larger bargain to get support to close the detention center at Guantanamo Bay and bring those detainees to the U.S. Congress has barred the transfer of prisoners who don't have a path to trial—those who appear to be detained indefinitely—and refused to give the president the money for a facility to house them on American soil.

Mr. KYL. I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from Minnesota.

RED RIVER VALLEY FLOODING

Mr. FRANKEN. I rise today to commend the communities of Minnesota's Red River Valley for their extraordinary flood mitigation efforts this year. Spring flooding in the Red River Valley is an enormous challenge to my constituents in Moorehead and in surrounding communities and the communities downstream.

Last year, these communities experienced record flooding with snow melt draining into the Red River and resulting in over 40 feet of water filling the valley. The families of the Red River Valley saw severe overland flooding resulting in the devastation of their homes, road closures, and the cutting off of transportation in and out of the area.

This year, the Red River Valley is getting ready for what is generally forecast to be a major flood. Right now the National Weather Service is forecasting a 90-percent chance of major flooding of over 35 feet. I spent this past weekend in Moorehead, MN, and surrounding communities and communities downstream meeting with local leaders and talking to folks on the ground getting ready for the flooding.

Their flood preparation efforts this year are truly impressive. The city of Moorehead and Clay County have been acquiring houses in the floodplain and moving them out of harm's way. As a result, Moorehead is going to need one-third fewer sandbags this year compared to last year.